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**APPEALS BOARD  
UTAH LABOR COMMISSION**

**TROY OGDEN,**

**Petitioner,**

**vs.**

**TRAMCOR CORP. and WORKERS  
COMPENSATION FUND,**

**Respondents.**

**ORDER AFFIRMING  
ALJ'S DECISION**

**Case No. 05-0745**

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Tramcor Corp. and its insurance carrier, Workers Compensation Fund (referred to jointly as "Tramcor" hereafter), ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Holley's award of temporary total disability compensation to Troy Ogden under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated §63-46b-12 and §34A-2-801(3).

**BACKGROUND AND ISSUES PRESENTED**

Mr. Ogden claims workers' compensation benefits for a back injury he suffered while working for Tramcor on August 31, 1999. Judge Holley held an evidentiary hearing on Mr. Ogden's claim on August 9, 2006, and then issued a series of decisions that culminated in her final order of December 16, 2006, awarding temporary total disability compensation to Mr. Ogden.

In requesting review of Judge Holley's decision, Tramcor argues that the award of temporary total disability compensation is contrary to the preponderance of medical evidence. Alternatively, Tramcor contends Judge Holley should have appointed a medical panel to determine when Mr. Ogden reached medical stability from his work injury. Finally, Tramcor contends that the temporary total disability compensation awarded by Judge Holley exceeds the maximum amount permitted under the Act.

**FINDINGS OF FACT**

The Appeals Board finds the following facts material to the issues presented by Tramcor's motion for review.

On August 31, 1999, Mr. Ogden was employed as a truck driver by Tramcor. While unloading his truck, he injured his lower back. On December 9, 1999, Dr. Mason performed a L5/S1 lumbar discectomy. On April 5, 2000, Dr. Mason concluded that Mr. Ogden had reached

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medical stability and could return to light duty work immediately, with a full duty release to follow in two weeks. However, on May 5, 2000, Dr. Mason noted that Mr. Ogden was again having difficulty with back pain, probably due to scarring at the surgery site. Dr. Mason undertook additional treatment and limited Mr. Ogden to light duty work. Two weeks later, Dr. Mason diagnosed Mr. Ogden with "recurrent sciatica, probably due to scar tissue, may require repeat MRI scanning." At this time, Dr. Mason took Mr. Ogden off work completely.

Thereafter, Mr. Ogden underwent a series of evaluations by different doctors. Dr. Warner and Dr. Felix did not believe additional surgery would be helpful but suggested additional conservative treatment. They did not express an opinion on whether Mr. Ogden had achieved medical stability. A third physician, Dr. Rhee, concluded that Mr. Ogden could not return to work as a truck driver but suggested additional diagnostic testing, changes in medication and, perhaps, pain management therapy. Dr. Rhee did not state that Mr. Ogden had yet achieved medical stability but predicted that he would reach medical stability at some point in the future after he "has been upgraded to the maximum tolerable dose of a Neurontin trial for management of neuropathic pain." Finally, Dr. Stromberg concluded that Mr. Ogden might benefit from additional surgery and expressed "surprise" at the suggestion Mr. Ogden might have achieved medical stability.

For the next several years, Mr. Ogden received opioids and other medications for his continuing pain. He finally underwent a second surgery on September 13, 2005, consisting of L4-5 and L5/S1 laminectomy and fusion. Following this surgery, Mr. Ogden's condition improved. As stated on July 17, 2006, by Dr. Marble, Tramcor's medical consultant, Mr. Ogden had suffered "persistent/recurrent diskopathy at L4-5 and L5-S1 substantiating pain complaints and disability up to the point of definitive treatment provided surgically September of 2005." Dr. Marble further stated that, following Mr. Ogden's second surgery, he achieved medical stability on July 17, 2006.

Based on his wage at the time of his work-related accident, Mr. Ogden is entitled to temporary total disability compensation at the rate of \$509 per week. Tramcor has accepted liability and already paid temporary total disability compensation to Mr. Ogden for the periods of: September 2 to October 25, 1999; December 9, 1999 to March 5, 2000; June 6 to June 11, 2000; and after September 13, 2005.

**DISCUSSION AND CONCLUSIONS OF LAW**

Tramcor concedes that Mr. Ogden's work-related back injury is compensable under the Utah Workers' Compensation Act. Tramcor also concedes that Mr. Ogden was entitled to temporary total disability compensation for limited periods of time after the initial injury, the first surgery and the second surgery. However, Tramcor disputes its liability for temporary total disability compensation for the extended time between Mr. Ogden's first and second surgeries.

An injured worker's right to temporary total disability compensation is governed by § 34A-2-410(1)(a) of the Act. Section 410(1)(a) provides that "in case of temporary disability, so long as the

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disability is total, the employee shall receive (compensation) . . . .” The Utah Supreme Court has issued two decisions that explain the proper application of § 410(a). In *Entwistle Co. v. Wilkins*, 626 P.2d 495, 498 (Utah 1981), the Court held that an injured worker’s temporary disability “may be found to be total if he can no longer perform the duties of the character required in his occupation prior to his injury.” In *Booms v. Rapp*, 720 P. 2d 1363, 1366 (Utah 1986), the Court ruled that “once a claimant reaches medical stabilization, the claimant is moved from temporary to permanent status and he is no longer eligible for temporary benefits.” Thus, *Entwistle* defines the beginning point for temporary total compensation and *Booms v. Rapp* establishes the end point. These standards are applied in particular cases according to the medical and other evidence actually submitted by the parties.

Tramcor has raised several arguments regarding the date Mr. Ogden achieved medical stability. Tramcor also argues that its liability for Mr. Ogden’s temporary total disability compensation cannot extend beyond 312 weeks, as provided by § 34A-2-410(b). The Appeals Board considers each of Tramcor’s specific arguments below.<sup>1</sup>

In general, Tramcor argues that the medical evidence does not prove that Mr. Ogden was medically unstable between June 12, 2000, and September 13, 2005. However, the opinion of Dr. Marble, Tramcor’s own medical expert, supports such a finding:

Mr. Ogden initially had a good outcome from his L5-S1 discectomy, but there was subsequent evidence of persistent diskopathy at L4-5 and L5-S1 substantiating pain complaints and disability up to the point of definitive treatment provided surgically September of 2005. . . . Fortunately, Mr. Ogden has realized a good outcome from the most recent L4 through S1 fusion performed September of 2005. He has weaned off of medications and in my opinion is now medically stable 9 months postoperative.

Judge Holley relied on this opinion in concluding that Mr. Ogden was not medically stable between June 2000 and September 2005. Tramcor attempts to explain away Dr. Marble’s opinion by arguing it is inconsistent with the Labor Commission’s *Supplemental Impairment 2006 Impairment Rating Guides*, §1.2d., which define medical stability as “the date when the period of healing has ended and the condition of the worker is not expected to materially improve or deteriorate by more than 3% Whole Person in the ensuing year.” However, the Appeals Board sees no inconsistency between Dr. Marble’s opinion and the foregoing guideline. Dr. Marble’s opinion recognizes that after Mr. Ogden’s original surgery, he experienced complications resulting in pain and disability until “definitive treatment” in the form of a second surgery produced good results. It is apparent that Dr. Marble did not believe Mr. Ogden actually achieved medical stability until after the second surgery.

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<sup>1</sup> The Appeals Board has modified the order of Tramcor’s arguments for ease of discussion.

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Tramcor also challenges Dr. Marble's opinion on the grounds "it is not within the purview of a medical doctor to determine whether an individual is capable of returning to work."<sup>2</sup> The Appeals Board is unaware of any reason that would prevent a physician familiar with the relevant facts from expressing an opinion on the effect of a medical condition on an individual's ability to return to work. Furthermore, other evidence supports Dr. Marble's opinion on this point. And, finally, the most significant part of Dr. Marble's opinion is its determination of the date Mr. Ogden achieved medical stability, rather than its observations on Mr. Ogden's ability to work.

Apart from its arguments related to Dr. Marble's opinion, Tramcor points to Dr. Mason's opinion of April 5, 2000, that Mr. Ogden was medically stable as of that date. However, Dr. Mason's opinion in April 2000 was supplanted by his statements during May and June 2000 that Mr. Ogden had developed scarring as a complication of his spine surgery, required additional medical tests and treatment, and could not perform his previous work duties. These later statements from Dr. Mason indicate Mr. Ogden was not medically stable. Likewise, Tramcor suggests that Dr. Rhee's opinion of August 17, 2000, can be viewed as establishing the date Mr. Ogden reached medical stability. However, as noted by Judge Holley, Dr. Rhee does not opine that Mr. Ogden **had** achieved medical stability. Instead, Dr. Rhee predicted that Mr. Ogden **would** reach medical stability at some time in the future if his medications were properly adjusted. Dr. Rhee was never asked to clarify or supplement this opinion with an actual determination of medical stability. Consequently, Dr. Rhee's opinion is insufficient to establish the date Mr. Ogden reached medical stability.

Tramcor also makes the alternative argument that, even if the foregoing medical opinions do not establish an earlier date for Mr. Ogden's medical stability, they at least show the existence of a medical dispute that must be referred to a medical panel.

Section 34A-2-601 of the Act permits the Commission to utilize impartial medical panels in evaluating disputed workers' compensation claims. In its Rule 602-2-2, the Commission has identified the situations calling for appointment of such a medical panel:

A panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. . . .

Tramcor argues that Dr. Mason's opinion of April 2000 and Dr. Rhee's opinion of August 17, 2000, conflict with Dr. Marble's opinion. However, as discussed above, Dr. Mason's opinion of April 2000 was supplanted by his subsequent opinions, and Dr. Rhee's opinion was indefinite and

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<sup>2</sup> It appears Tramcor is referencing a short note Dr. Marble supplied to Tramcor's counsel on August 3, 2006, in which Dr. Marble states: "I considered the [temporary total disability] period from 6/12/00 to 9/13/05 to be reasonable based on Mr. Ogden's inability to return to his former employment and with the belief that he was given no other appropriate options."

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speculative. Consequently, Dr. Mason and Dr. Rhee's opinions do not conflict with Dr. Marble's opinion and do not require appointment of a medical panel in this matter.

In light of the foregoing, the Appeals Board concludes that Mr. Ogden was temporarily and totally disabled for the periods of September 2 to October 25, 1999, December 9, 1999, to March 5, 2000, and June 6, 2000, to July 17, 2006. The Appeals Board now considers the extent to which Mr. Ogden can receive compensation for those periods of temporary total disability.

Section §34A-2-410(1)(b) of the Utah Workers' Compensation Act limits injured workers to no more than 312 weeks of temporary total disability compensation. It is undisputed that Mr. Ogden's weekly rate for such compensation is \$509. Consequently, Tramcor's liability for temporary total disability compensation in this matter is capped at \$158,808. Once Tramcor has paid Mr. Ogden that amount, Tramcor has no further liability for any additional temporary total disability compensation. In computing its remaining liability, Tramcor is entitled to deduct any payments of temporary total disability compensation it has already made to Mr. Ogden. Any compensation that remains due should then be attributed to the earliest unpaid weeks of eligibility. Also, Mr. Ogden is entitled to interest on such unpaid compensation pursuant to §34A-2-420(3) of the Act. This interest is in addition to Mr. Ogden's disability compensation and, therefore, is not included in computing the cap on compensation under §34A-2-410.

**ORDER**

The Appeals Board affirms Judge Holley's determination that Mr. Ogden is entitled to additional temporary total disability compensation. The Appeals Board modifies Judge Holley's order, as set forth in paragraph one, page two, of her amended decision dated December 1, 2006, as follows:

Tramcor shall pay temporary total disability compensation to Troy Ogden at the rate of \$509 per week for the first 312 weeks falling within the periods of: September 2 to October 25, 1999; December 9, 1999, to March 5, 2000; and June 6, 2000, to July 17, 2006.

Tramcor shall also pay Mr. Ogden interest on the foregoing compensation as provided by § 34A-2-420(3) of the Act, such interest to be computed from the date each installment of compensation should have been paid.

From the foregoing compensation and interest otherwise due Mr. Ogden, Tramcor shall deduct the attorney fee authorized by Utah Administrative Code R612-1-5 and pay such attorney fee directly to Michael Belnap, Esq., Mr. Ogden's attorney in this matter.

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It is so ordered.

Dated this 23<sup>rd</sup> day of April, 2007.

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Colleen S. Colton, Chair

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Patricia S. Drawe

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Joseph E. Hatch